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# Title IX & Sexual Harassment Response

Participants in Sexual Harassment policy process

Fall 2020

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## Agenda

- Title IX Scope & Jurisdiction
- Title IX & Other Policies
- Institutional Response to Sexual Harassment
- Investigations
- Hearings
- Appeals
- Informal Resolution
- Confidentiality

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# Title IX Scope & Jurisdiction

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## What is Title IX?

"[N]o person in the United States shall on the basis of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance."

32 C.F.R. § 106.31

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# Who does Title IX apply to?

- Entities that receive federal financial assistance, including colleges and universities that participate in Title IV funding
  - Not individual persons
    - But institutions are required to adopt policies and procedures to implement Title IX that *do* apply to individual persons

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# What sexual harassment does Title IX apply to?

- Title IX applies to sexual harassment in the "education program or activity" of a federal funding recipient
  - Title IX defines "education program or activity" to include the "operations" of educational institutions
- Title IX does not apply to private conduct occurring in private location that is not part of education program/activity

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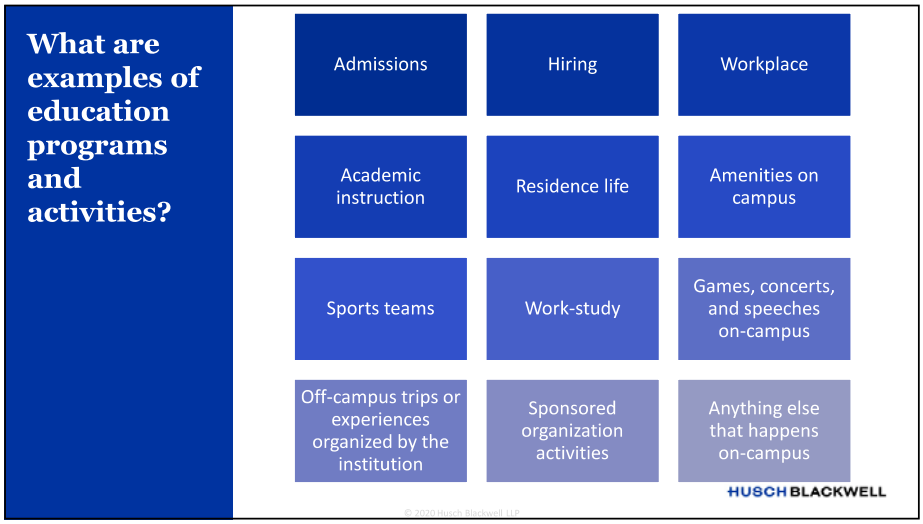


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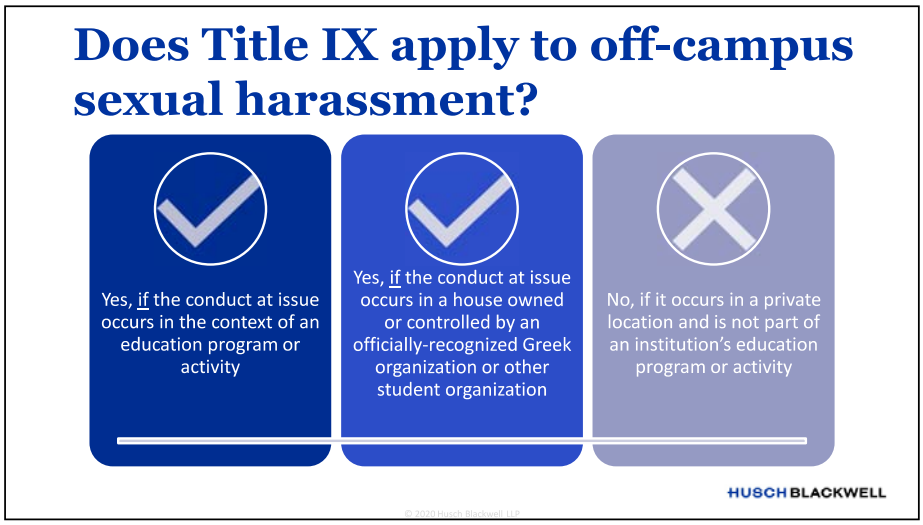


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## Example (included in EP&A)

Student is sexually assaulted in a residence hall on-campus. The sexual assault occurs on a Saturday evening. The identity of the perpetrator is not immediately known.

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## Example (included in EP&A)

The tennis team travels to a different school for a tournament and stays overnight at a hotel. At the hotel where the team is staying, the coach sexually harasses the team's manager.

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## Example (excluded from EP&A)

During spring break, two students travel to another state and stay at an all-inclusive resort owned by a prominent hotel chain. The students booked the trip on their own for leisure purposes. While staying at the resort, one student sexually assaults the other student.

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## Does Title IX apply to sexual harassment in other countries?

- No – the Department of Education interprets Title IX to apply only within the geographic boundaries of the United States
- Other countries may have laws that govern sexual harassment

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## Does our institution have other policies that might apply?

- Institutions are free to use
  - Student code of conduct
  - Faculty/employee handbooks
  - Other policies

  to address sexual harassment that does not occur in an education program or activity

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## What is sexual harassment?

Conduct on the basis of sex that is:

- Quid pro quo harass-ment
- Hostile environment harassment
- Sexual assault
- Dating violence
- Domestic violence
- Stalking

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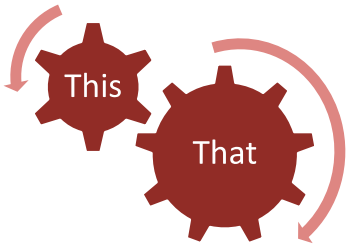
## What is quid pro quo?

- An employee of the institution conditions the provision of some aid, benefit, or service on another person's participation in unwelcome sexual conduct
  - Often arises in the employment context or where an employee holds a position of authority over a student

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## Example of quid pro quo

Manager tells subordinate employee that subordinate employee will not get a raise this year unless subordinate employee performs sexual favors for manager. Subordinate employee is in a relationship with another individual and has no interest in performing sexual favors for manager.

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## Another example of quid pro quo

A faculty member tells a student that the student can increase the student's grade from a "B" to an "A" if the student wears revealing clothing that is "more pleasing" to the faculty member's eye.

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## What is hostile environment?

Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity.

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## How do we determine if a hostile environment exists?

- Consider all the facts and circumstances, such as:
  - The type of misconduct
  - The frequency of the misconduct
  - Where the misconduct occurs
  - Whether a power differential exists, etc.
- From the perspective of a reasonable person

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## Example of hostile environment

Student A repeatedly gropes Student B's buttocks when the two are in the elevator of their shared dormitory. Student B has no romantic interest in Student A and has told Student A to stop. But Student A persists, causing Student B to use the stairs instead of the elevator and to avoid Student A in other areas of the dormitory.

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## Another example of hostile environment

Student A asks Student B to go on a date, and Student B says "no." Student A then repeatedly sends Student B text messages using various vulgar terms that suggest Student B is promiscuous. When Student A and Student B attend a shared biology class, Student A mutters these vulgar terms toward Student B, loud enough for others to hear. Student B blocks Student A's phone number and drops the biology class to avoid Student A.

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## Another example of hostile environment

Student A obtains a nude picture of Student B from Student B's former romantic partner. Student A threatens to post the nude picture on social media unless Student B poses nude for Student A in Student A's dorm room. Student B poses for Student A to avoid the nude picture being circulated. Student A is not an employee.

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## Does the First Amendment matter?

- While sexual harassment can be verbal or written in nature, sexual harassment under Title IX does not include conduct that is protected by the First Amendment
- The subjective offensiveness of speech, alone, is not sufficient to create a hostile environment

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## Example (not-hostile environment)

Student A actively supports a prominent political candidate who has been accused of sexually harassing campaign staffers. Student B files a complaint that Student A's political support of the candidate has caused a sexually hostile environment on campus.

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## What is sexual assault?

Title IX regulations define "sexual assault" as incorporating the following classes of conduct:

- Rape
- Sodomy
- Sexual assault with an object
- Fondling
- Incest

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## What is rape?

Having carnal knowledge of a person, without the consent of the victim, including instances where the victim is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity. There is "carnal knowledge" if there is the slightest penetration of the vagina or penis by the sex organ of the other person. Attempted rape is included.

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## What is consent?

- Institutional definitions may vary
- Words or actions that a reasonable person in the respondent's perspective would understand as agreement to engage in the sexual conduct at issue
- A person who is incapacitated is not capable of giving consent
- Consent cannot be procured by coercion
- Be aware of minimum age of consent

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## What is incapacity?

Incapacity refers to a state where a person does not appreciate the nature or fact of sexual activity due to the effect of drugs or alcohol consumption, medical condition or disability, or due to a state of unconsciousness or sleep.

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## Example (incapacitated)

Student A has had ten cocktails over the course of two hours. Student B takes Student A to Student B's apartment. Student A cannot walk without support, forgets Student B's name, and passes into a stupor when Student B places Student A on Student B's bed. Student B then has sex with Student A.

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## Example (not-incapacitated)

Student A has had four beers over the course of two hours. Student A calls Student B to see if Student B is home. Student A then drives from campus to Student B's off-campus apartment. Upon arriving, Student A initiates sexual contact with Student B, and then insists that Student B use contraception before the two have intercourse. Student A is an active participant in the intercourse.

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## What is sodomy?

Oral or anal sexual intercourse with another person without the consent of the victim, including instances where the victim is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

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## What is sexual assault with an object?

Using an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity. An "object" or "instrument" is anything used by the perpetrator other than the perpetrator's genitalia.

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## What is fondling?

Touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

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## Example of fondling

Student A and Student B attend a dance held in the student union. While on the dance floor, Student A gropes Student B's groin without Student B's permission. Student B does not welcome the groping and views it as unwelcome.

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## What is incest?

Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

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## What is statutory rape?

Sexual intercourse with a person who is under the statutory age of consent as defined by law.

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## What is domestic violence?

Felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the state, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the state.

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## What is dating violence?

"Dating Violence" is violence committed by a person:

- Who is or has been in a social relationship of a romantic or intimate nature with the victim; and
- Where the existence of such a relationship will be determined based on consideration of the following factors:
  - The length of the relationship;
  - The type of relationship; and
  - The frequency of interaction between the persons involved in the relationship.

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## Example of dating violence

Employee A and Employee B are engaged to be married but live separately and have no children in common. Employee A and Employee B get into an argument in Employee A's car in the university's parking lot. During the argument, Employee A slaps Employee's B's face and tells Employee B to "shut your mouth."

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## What is stalking?

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:

- Fear for their safety or the safety of others; or
- Suffer substantial emotional distress.

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## Example of stalking

Student A is infatuated with Student B, who has rebuffed Student A's romantic advances. Thereafter, Student A dresses in black and sneaks up to the window of Student B's Greek house at night in an attempt to see Student B. Student A does this twice before being caught in the act during Student A's third attempt.

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## Does Title IX also prohibit retaliation?

Yes – Title IX prohibits intimidation, threats, coercion, or discrimination against any individual for the purpose of interfering with any right or privilege secured by Title IX and its implementing regulations or because an individual has made a report or complaint, testified, assisted, participated in or refused to participate in any manner in an investigation, proceeding, or hearing under the institution's policy.

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## Example of retaliation

Employee A testifies at hearing in support of Employee B's complaint of sexual harassment against manager. After institution finds that manager sexually harassed Employee B, manager demotes Employee A to punish Employee A for testifying against manager.

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## What about state laws governing sexual harassment on campus?

- Institutions must still comply with state laws unless
- They conflict with some element of the new Title IX regulation in which case
- State law is preempted

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## Group Scenario

Student A reports that Student B sexually harassed Student A on two occasions. The first incident consisted of Student B groping Student A's genitals without permission while the two were dancing during a formal hosted by a Greek organization at a local party venue the Greek organization rented. The second incident consisted of Student B attempting to have sexual intercourse with Student A a week later, when Student A was heavily intoxicated at a tailgate party held in the parking lot of a rival institution's football stadium.

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# Title IX & Other Policies

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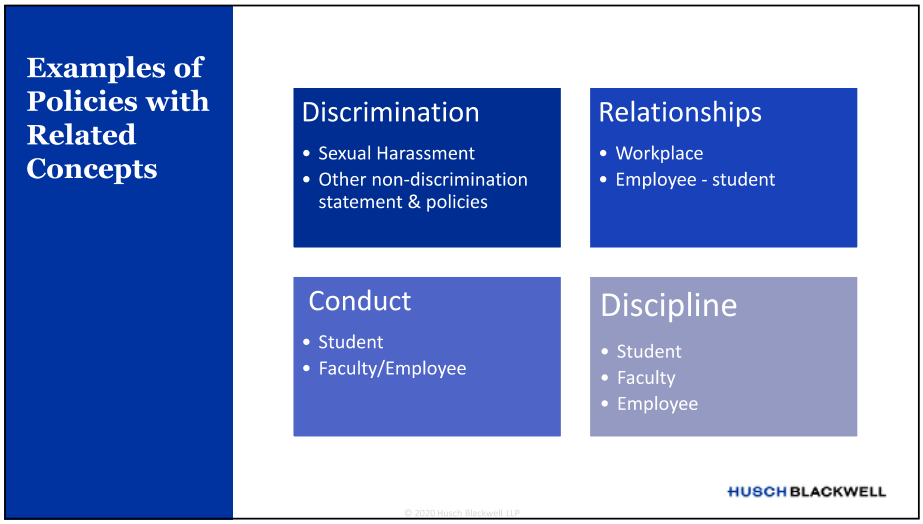


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## How should we treat alleged conduct that may violate Title IX and Title VII policies?

"The Department recognizes that employers must fulfill their obligations under Title VII and also under Title IX. There is no inherent conflict between Title VII and Title IX, and the Department will construe Title IX and its implementing regulations in a manner to avoid an actual conflict between an employer's obligations under Title VII and Title IX."

— Preamble to 2020 Title IX Regulations (also 34 C.F.R. § 106.6(f))

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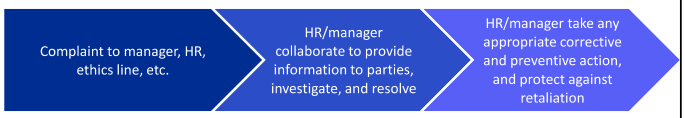
## Example of typical "Title VII" process

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## What triggers an employer's liability for sexual harassment under Title VII?

- ☑ An employer, its agent, or its supervisor
- ☑ Knew or should have known
- ☑ About severe or pervasive sexual harassment
- ☑ That a reasonable person would consider intimidating, hostile, or abusive
- ☑ By an employee or non-employee over which it has control and
- ☑ Failed to take appropriate corrective action

- U.S. Equal Employment Opportunity Commission, *Harassment* (https://www.eeoc.gov/harassment)

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## Group Scenario

Employee A reports that Employee B sexually harassed Employee A by installing a program on Employee A's computer that caused pornography to play when Employee A logged on. This occurred only once, after which Employee A had the program removed from Employee A's computer. Employee A makes a formal complaint under the institution's Title IX sexual harassment policy.

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# Institutional Response to Sexual Harassment

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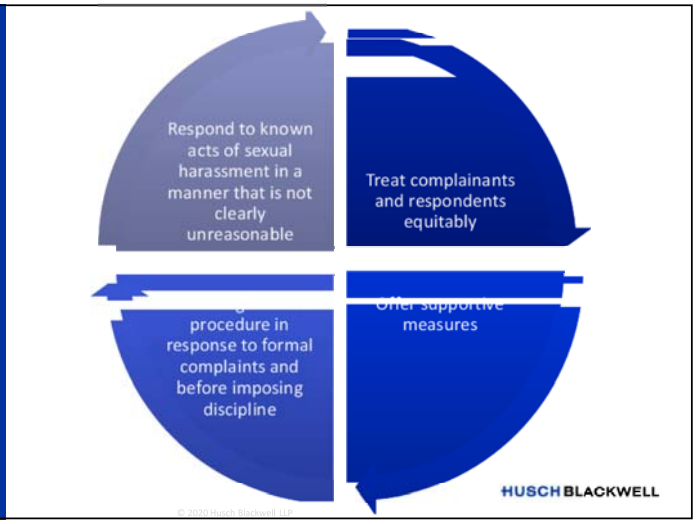
## What are the institution's overall duties?

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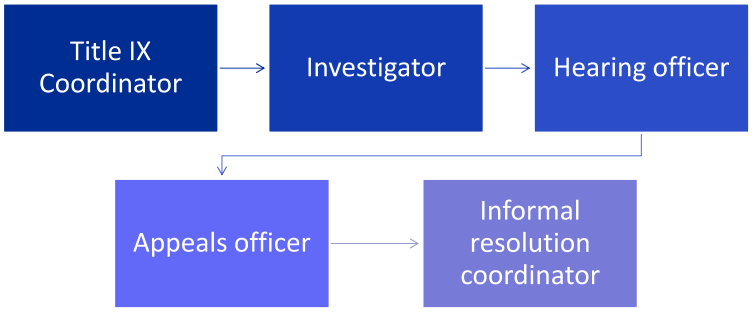
## Who are the key institutional actors in the grievance process?

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## How does an institution get notice of sexual harassment?

Sexual harassment response is triggered when institution has "actual knowledge" of potential sexual harassment.

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# What is "actual knowledge"?

- "Actual knowledge" occurs when
  - An institutional official, with authority to take corrective action
  - Observes or receives a report
  - Of sexual harassment occurring in the institution's education programs and activities

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# Is an "institutional official" the same as a "responsible employee"?

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## When do we reach out to the alleged victim?

- After institution has actual knowledge of alleged sexual harassment, Title IX Coordinator must contact alleged victim
- Provide information about supportive measures, explain the grievance process and how to file a formal complaint, and discuss the alleged victim's wishes

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## What if we can't identify the alleged victim from a report?

- Title IX Coordinator should oversee preliminary investigation to determine identity of alleged victim
- If identity of alleged victim cannot be discerned after reasonable inquiry, matter should be documented and consideration given as to whether other policies (such as student code of conduct) are utilized

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## What are supportive measures?

- Non-disciplinary, non-punitive supports and accommodations designed to preserve access to education programs and activities
- Reasonably available without fee or charge
- Without unreasonably burdening the other party

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## Examples of supportive measures

- Counseling
- Academic accommodations
- Housing accommodations
- Security escorts
- Leave of absence
- Increased security or monitoring
- Modified work schedules
- Mutual no-contact order where implicated by facts

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## Example of reasonable supportive measure

Student A and Student B used to be in a romantic relationship. Since the relationship ended, Student B has gossiped about Student A's sexual proclivities with Student A's friend group. Student A does not wish to file a formal complaint, but wants access to counseling and to be allowed to change sections of a course that Student A currently shares with Student B.

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## Example of unreasonable supportive measure

Employee A alleges Employee B engaged in sexual harassment by pervasively telling unwelcome sexual jokes in the workplace. Employee A asks the institution to retain the services of a specific psychologist in a different state to provide Employee A counseling at a cost of $1,000 per hour and to pay for Employee A's travel expenses. The institution has access to local counselors of suitable qualification who are under a fixed contract to provide counseling to employees.

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## Can we utilize interim removals or suspensions for students?

- Students may be removed on a temporary basis only if:
  - Individualized safety and risk analysis
  - Determines that an immediate threat to physical health or safety of any student or other individual arising from the alleged sexual harassment justifies removal
  - Student is given immediate notice and opportunity to contest the removal

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## Example of immediate threat to physical health or safety

Student A is reported to have raped Student B at gunpoint. Police engage in hot pursuit and apprehend Student A attempting to flee campus. When apprehended, Student A is found in possession of a loaded and unregistered firearm.

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## Example of no immediate threat to physical health or safety

Student A reports that Student B committed sexual harassment by repeatedly posting pornographic images on Student B's door in a Greek house. Student A does not allege that Student B has engaged in any physical conduct. When notified of formal complaint, Student B agrees to voluntarily remove images and cooperate with investigation.

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## Can we place employees on administrative leave?

- Yes – employee respondents may be placed on administrative leave without requisite showing of threat to physical health or safety
- Whether an opportunity to challenge administrative leave must be given depends on employee status and other policies (i.e., Faculty Handbook)

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## What is a formal complaint?

| What | Who | How |
|---|---|---|
| • Document<br>• Alleging sexual harassment<br>• Requesting an investigation / resolution under grievance procedures | • Signed by<br>  • Alleged victim or<br>  • The Title IX Coordinator<br>• If filed by alleged victim, alleged victim must be current or attempted participant in education programs and activities<br>• Third-parties may not file formal complaints on behalf of an alleged victim | • Either physical or electronic submission |

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## When may the Title IX Coordinator file a formal complaint?

- Typically when there is an important institutional interest in adjudicating a report irrespective of the alleged victim's wishes
- Typically involves serious misconduct, repeated misconduct, or misconduct by employees
- If alleged victim does not wish to file a formal complaint, Title IX Coordinator's decision to do so must not be clearly unreasonable

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## Example of T9 Coordinator formal complaint

Student A and Student B each separately report they were sexually assaulted by Student C. Student A and Student B each suspect they were drugged by Student C. Neither Student A nor Student B wishes to file a formal complaint, but each has indicated they will cooperate with an investigation if the Title IX Coordinator files a formal complaint.

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## When must we dismiss a formal complaint?

- If filed by the alleged victim, and the alleged victim is not a current or attempted participant in education programs and activities
- Complaint does not allege sexual harassment in the institution's education programs or activities
- Complaint alleges sexual harassment abroad
- Conduct alleged would not amount to sexual harassment even if it occurred as reported

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## Example of dismissal

Student A reports that Student B sexually assaulted Student A in their hometown during summer break. The alleged assault occurred in Student B's house after the two attended a co-ed softball game hosted by a local recreation league. Student A and Student B have had no contact since the alleged sexual assault.

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## Example of dismissal

Student A makes a sexual harassment complaint against a faculty member because the faculty member requires students in English class to read a "Confederacy of Dunces" which contains sexual content that Student A finds immoral and obscene. Student A has no other basis for the complaint but the required reading of the book.

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## When may we dismiss a formal complaint?

- Alleged victim indicates in writing a desire to withdraw the complaint (or particular allegations)
- Respondent is no longer enrolled in or employed by the institution
- Specific circumstances prevent the institution from gathering evidence sufficient to reach a determination

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## Example of permissive dismissal

Prior to investigation being completed, respondent graduates institution and complainant indicates she will not testify at a hearing because any discipline would be meaningless in light of respondent's graduation. There are no witnesses to the alleged sexual harassment and no non-testimonial evidence, such as video footage.

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## Can we consolidate the complaints?

Yes – complaints can be consolidated if they arise out of the same facts and circumstances.

- Multiple respondents
- Multiple complainants
- Multiple allegations against a single respondent
- Multiple allegations from a single complainant

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## Example of permissible consolidation

Students A and Student B, who are roommates, allege that Student C barged into their dormitory room drunk and propositioned them for sex. Student A and Student B each file their own formal complaint of sexual harassment from the same incident.

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## Example of impermissible consolidation

Student A files a formal complaint that Student B sexually assaulted Student A two years ago after Student A was incapacitated by drinking. Student C, Student B's present romantic partner, files a formal complaint that Student B committed dating violence by slapping Student C during an argument a month ago.

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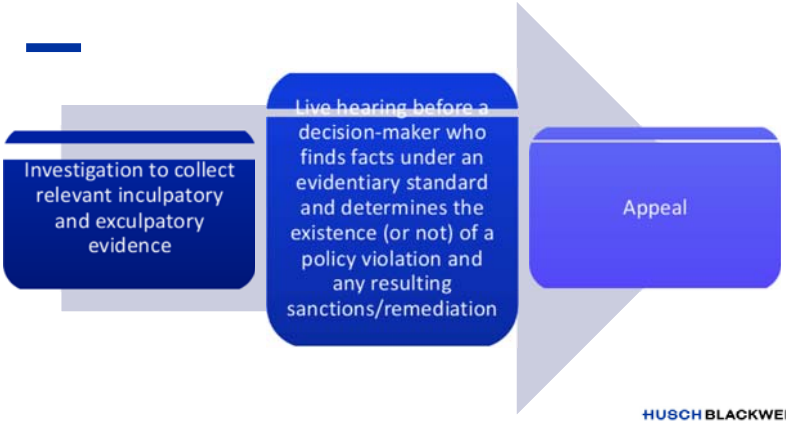
## What is the grievance process?

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## What general principles govern the grievance process?

- Equitable treatment of complainants and respondents
- No stereotypes based on a party's status as complainant or respondent
- Presumption respondent did not violate policy unless and until a determination is made after hearing
- Conflict and bias-free institutional participants

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## Examples of impermissible stereotypes

"Anyone who would go into another's bedroom drunk must have wanted to have sex."

"Greeks can't be trusted because they will just lie for each other."

"People who are dating can't commit sexual assault against each other."

"There are no false reports of rape. Therefore, every complainant must be believed."

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# What is a conflict of interest?

- When an individual has a material connection to a dispute, or the parties involved, such that a reasonable person would question the individual's ability to be impartial
- May be based on prior or existing relationships, professional interest, financial interest, prior involvement, and/or nature of position

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# Example of conflict of interest

Student A files a formal complaint of sexual harassment against Student B. One of the hearing panel members selected is Student B's faculty advisor who has previously written letters of recommendation for Student B's application to law school in which faculty advisor wrote that Student B is "honest to a fault."

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## Example of conflict of interest

Employee A accuses an employee of a food service vendor of sexual harassment. Institution assigns an investigator whose spouse is employed as a manager for the food service vendor and who directly supervises the accused employee.

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## Example of bias

Institutional employee chosen to serve on a hearing panel chairs the board of a local non-profit dedicated to sexual assault advocacy. During a speech at the non-profit's annual gala, the employee states: "The presumption of innocence is wrong in cases of sexual assault. I firmly believe a person accused of sexual assault must prove their innocence."

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## Example of bias

Investigator assigned to investigate a formal complaint of sexual assault has repeatedly told colleagues that the investigator believes most complainants just "regret that they got drunk." He tells a co-investigator: "I just don't think it's ever fair to hold anyone responsible when both parties are drinking."

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## How long does a grievance process take?

- There is no firm deadline, and the length of the grievance process varies depending on a variety of factors
- Institution must be reasonably prompt, advise parties of timelines for particular phases of the process, and notify parties of extensions of timelines and the reasons for the same

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# What do we do if we find sexual harassment occurred?

- If grievance process results in a finding of sexual harassment:
  - Discipline for the respondent as determined by those with authority over the respondent
  - For complainant, grant remedies reasonably necessary to restore or preserve access to education programs and activities

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## Group Scenario

Student A reports that Student B stalked Student A by peeping through Student A's changing room door at the hospital where both are doing rotations, and by stealing Student A's underwear from the laundry at the dormitory. Student A seeks supportive measures but does not wish to file a formal complaint and is concerned Student B may retaliate if Student B learns of the report. Student A graduates in two months, while Student B will not graduate for another year. It is unclear whether Student A will testify at a hearing.

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# Investigations

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## What is the purpose of an investigation?

- For the institution
- To collect relevant inculpatory and exculpatory evidence
- Sufficient to permit an impartial decision-maker to determine
- Whether or not the reported sexual harassment occurred

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## What is inculpatory evidence?

- Evidence tending to support the proposition a respondent committed sexual harassment as alleged
- Example: A text message sent the day after an incident from the respondent stating: "I never should have forced you to have sex with me after you said 'no.' I'm so sorry for what I did."

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## What is exculpatory evidence?

- Evidence tending to support that the respondent did not commit sexual harassment as alleged
- Example: A text message sent the day after an incident from the complainant stating: "I know that I said 'yes' at the time. And I knew what I was doing. But now I feel like you just used me as a one-night-stand."

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## What are the general principles of an investigation?

- Parties must have sufficient notice to prepare and meaningfully participate
- Investigator has an independent duty to collect relevant inculpatory and exculpatory evidence
- Parties have an equal opportunity to present their statements, evidence, and to identify witnesses
- Parties have equal opportunity to review and comment on evidence developed
- Investigation is evidence-gathering; not fact-finding

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## How do we tell the parties about an investigation?

- Institution must provide the parties written notice of a formal complaint that includes sufficient details about the "who, what, when, where, and how"

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## What else does the notice need to say?

- Written notice must also include:
  - Statement of presumption respondent is not responsible unless and until a determination is made at the end of the process
  - That parties have the right to an advisor of their choice
  - That parties have the right to inspect and review evidence
  - Any prohibition on providing knowingly false statements or information

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## How do we collect evidence in an investigation?

Interviews of parties and witnesses

Collection of non-testimonial evidence

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## What are some general principles about interviewing?

| | |
|---|---|
| Timing | Conduct interviews as soon as reasonably possible to maximize the most accurate memories |
| Setting | Choose a private and quiet setting |
| Role | Maintain role as fact-gatherer; not a prosecutor; not a defense attorney |
| Prepare | Anticipate questions that you will be asked and have responses ready |

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## Example question

From student witness: "Will I be disciplined if I don't show up for the hearing?"

Answer: "It's very important for you to attend so we have accurate and complete information. And I'm personally asking you to attend if your presence is requested. But no, you won't be disciplined for failing to attend."

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## Another example question

- From a party: "I want to tell you something 'off-the-record.' Is that okay?"
- Answer: "The nature of the interview is that everything is 'on-the-record.' So no, I can't have an 'off-the-record' conversation with you. But you can have a confidential conversation with one of the University counselors."

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## How do you structure an interview?

- Rapport building/information providing phase
- Substantive testimony collection
- Closure/information providing phase

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## How do you build rapport?

- Take the time to learn basic information about the interview subject before conducting the interview
- Learn something about the subject and share something about yourself; find commonality
- Explain the nature of the investigation, your role, and the rules of the interview
- Explain why you need accurate and detailed information
- Acknowledge the stresses the subject is likely feeling

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## Example of rapport building

"I saw in the directory that you are from Colorado. My family likes to go white water rafting on the Arkansas River. Do you know of any other good places to raft?"

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# Things helpful to say in every interview . . .

- "If I ask a question you don't understand, please tell me."
- "If I ask a question and you don't know the answer, it's okay to say you don't know."
- "If you think I've misunderstood anything you say today, please tell me."
- "I want to get as much information as possible, so please be detailed in what you share. And if I don't ask about something you think is important, please tell me."
- "To do my job, I need accurate information. So I always remind every witness that it's important to tell the truth."

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# How do I ask questions in the substantive phase?

- Open-ended and non-suggestive invitations
- Use facilitator words to keep the narrative flowing
- Use cued-invitations to expand particular topics
- Delay use of recognition prompts as long as possible
- Avoid suggestive or leading questions
- Save externally derived information for last

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## Examples of open invitations

- "Tell me what happened that night."
- "Will you walk me through what you remember?"
- "Tell me more about that."
- "What happened next?"

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## Examples of facilitators

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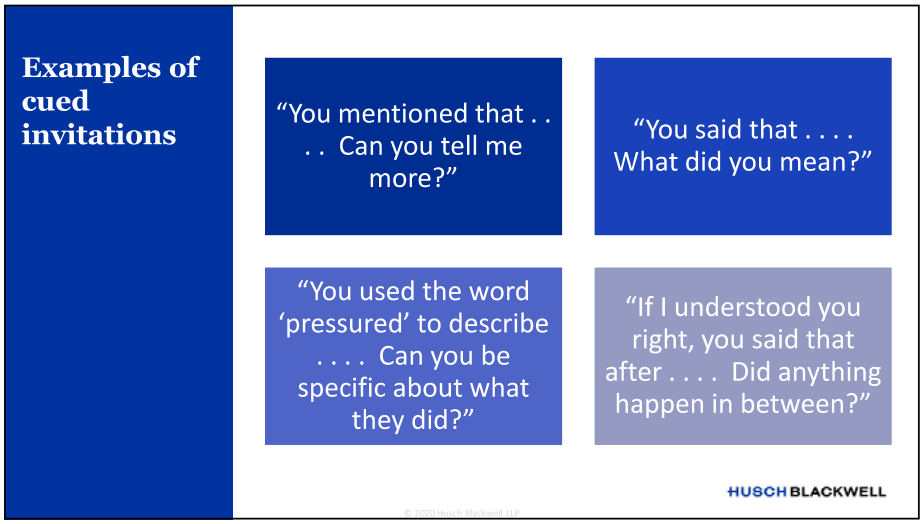


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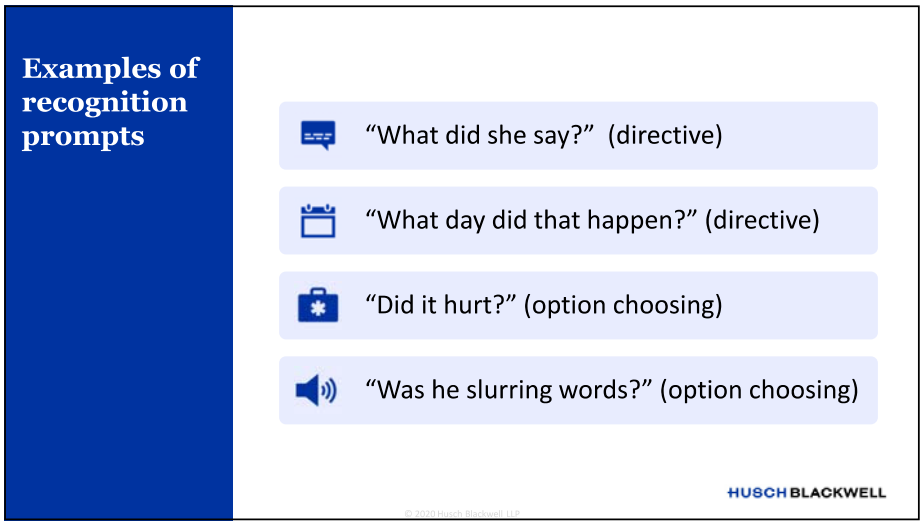


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## Examples of suggestive questions (avoid)

"I'm sure it's difficult when you see him on campus. Do you agree?"

"You probably thought that was an invitation to have sex, right?"

"If I were in your position, I would probably feel threatened. Did you?"

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## How do we make a record of the interview?

- Note-taking and audio recording are both appropriate methods of making a record of the interview
- If the investigator takes notes, they should be used to create a coherent interview memorandum shortly after the interview while the interview is fresh in the investigator's mind
- If the investigator records the interview, the investigator must be sure to clearly state on the record the time, place, date, and persons involved in the interview

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## Do parties/witnesses have a right to record the interview themselves?

- No – parties do not have the right to insist on recording an interview
- If the interview is recorded, the institution should make the recording and give the parties access as required at the appropriate time

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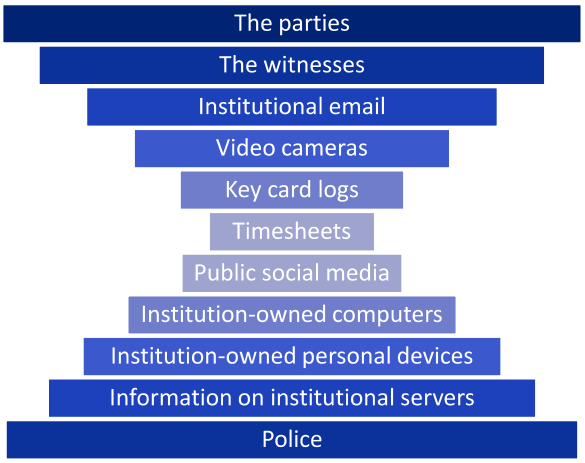
## Example sources of non-testimonial evidence

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## May an investigation collect evidence on sexual history?

- Generally, no – Evidence of a complainant's prior sexual behavior is relevant only if offered to prove that someone other than the respondent committed the conduct, or if evidence of specific incidents of the complainant's prior sexual behavior with the respondent are offered to prove consent

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## May an investigation collect and rely on privileged records?

- Only if a party waives the privilege
- An institution may not access information under a legally recognized privilege unless the holder of the privilege waives it
- Institution cannot unilaterally access its own counseling and health files for investigation purposes

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## Example of permissible use

Student who makes report of sexual assault executes a HIPAA-compliant release requesting and authorizing the hospital to provide a copy of her SANE/SART examination to the investigator.

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## Example of impermissible use

Respondent tells investigator he met with an attorney the day after the alleged sexual assault. The investigator demands that the respondent reveal what he told his attorney. When the respondent declines, the investigator states he will note that in the report and advise the hearing panel to draw an adverse inference against the respondent for "failing to cooperate."

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## Do the parties have access to the evidence?

- At a minimum, parties must be given access to all inculpatory and exculpatory evidence directly related to the allegations (regardless of whether the institution intends to rely on it) at least 10 days before the investigation report is finalized
- Evidence must be provided to a party and their advisor in physical copy or electronically
- Any earlier access to the evidence must be provided equally

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## Do the parties get to respond to the evidence?

- Yes – after they review the evidence provided at least 10 days prior to issuance of the investigation report, parties can provide written responses
- Depending on written responses, additional investigation may be needed
- Investigator should consider the written responses in drafting final language of investigation report

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## How is the investigation concluded?

- Issuance of a written investigation report
- Must fairly summarize the evidence collected, including both inculpatory and exculpatory evidence
- Must be provided to each party and their advisor at least 10 days prior to any hearing

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## Does the investigation report make findings?

- No – the investigation report fairly summarizes the relevant inculpatory and exculpatory evidence collected during the investigation
- Under the new Title IX regulation, factual findings and determinations of policy violations are made by a decision-maker at a subsequent hearing

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## May parties have an advisor during the investigation?

- Yes – parties may be accompanied to any investigative interviews and meetings by an advisor of their choice
- Advisor may be an attorney, but does not have to be
- Institution may confine advisor to a passive role during the investigation phase
- Institution is not required to provide an advisor during the investigation phase

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## What if the advisor breaks the rules?

- Institution may impose limits on the advisor's role and certain behavior standards
- Must be applied equally for both parties
- Institution may exclude advisor who violates rules, but must pause the relevant interview, meeting, or interaction until the party has a new advisor

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## Example of advisor breaking the rules

A student brings an aggressive attorney as their advisor to an interview. The institution's policy states that advisors are to remain passive and not argue on behalf of the parties they are advising. During the interview, the attorney repeatedly interrupts the investigator, objects to questions, argues that the investigator should ask different questions, and attempts to present legal arguments citing caselaw.

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## Example of advisor breaking the rules

A student names the student's mother as advisor. The institution's policy states that advisors may not obstruct communications between the institution and a party. The student's mother tells the investigator the investigator is to communicate solely through the mother and not send any emails directly to the student. When the investigator emails the student directly to schedule an interview, the mother calls and verbally attacks the investigator.

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## Are parties subject to a "gag" order during the investigation?

- No – the institution may not restrict the ability of parties to discuss the allegations or to gather and present relevant evidence, which includes talking to witnesses
- But institution can still enforce prohibitions on witness intimidation, witness manipulation, false statements, retaliation, harassment, etc.

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## Example of permissible conduct

Respondent accused of sexual assault sends text messages to various students who may have observed the complainant's level of intoxication on the night in question. Respondent's text says: "Please contact me ASAP if you believe the complainant was sober."

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# Example of impermissible conduct

Respondent tells roommate that respondent has been accused of sexual assault and "it's important that we get our stories lined up." Roommate states his belief that respondent arrived home at 2:00 a.m. Respondent says: "No. You're going to say you saw me here in bed at 11:00 p.m. That's what you need to say or I'm screwed. I'll owe you for this . . ."

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## Group Scenario

Student accuses Graduate Teaching Assistant of using a power differential to coerce student into performing oral sex. Student has received counseling since the incident and tells the investigator the counselor has diagnosed PTSD. GTA denies the oral sex was coerced. GTA claims that student consented and previously performed oral sex on another GTA. GTA tells investigator GTA has procured an expert witness who will opine student was not coerced and was not influenced by the power differential. Student identifies several witnesses who will testify GTA was a "creep."

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# Hearings

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## What is the purpose of the hearing?

- To hear testimony and receive non-testimonial evidence so that
- The decision-maker can determine facts under a standard of evidence
- Apply those facts to the policy, and
- Issue a written determination resolving the formal complaint and imposing discipline/remedial measures as necessary

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## What standard of evidence can be used?

- Either
  - Preponderance of the evidence or
  - Clear and convincing evidence
- Institution must select a standard and apply it uniformly in all cases, regardless of the identity of the respondent

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## Who runs the hearing?

- Regulation requires hearing to be administered by a "decision-maker(s)"
- Means institution can use a single hearing officer or a hearing panel (presumably, with a chairperson)

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## What are the logistics of a hearing?

- Hearing must be recorded (audio or video) or transcribed
- Hearing must have "live"– i.e., contemporaneous participation by parties and their advisors
- Hearing can be held in a single room or with the parties separated in different rooms
- Hearing can be held virtually using suitable software

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## Who attends a hearing?

- The decision-maker(s)
- Other necessary institutional personnel or institutional advisors (i.e., attorneys)
- The parties
- Each party's advisor
- Witnesses as they are called to testify
- Other support persons for parties, if permitted by institution

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## Do we provide a party's advisor?

- Default rule is that a party selects and brings an advisor of their choice to the hearing
- Advisor can be, but does not have to be, an attorney
- If a party does not have an advisor, institution must supply one for the purpose of questioning the other party and witnesses on behalf of the student in question

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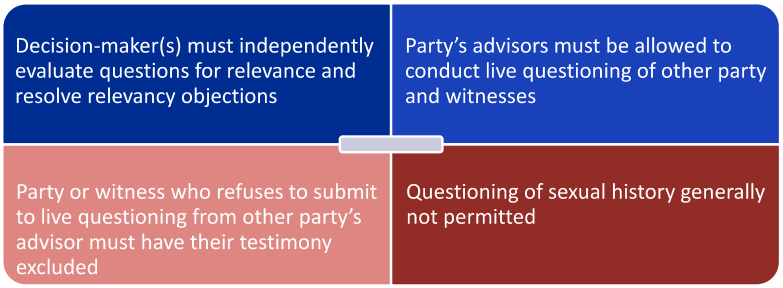
## How does the hearing actually work?

- Title IX regulation is largely silent on specific elements
- Required elements include:

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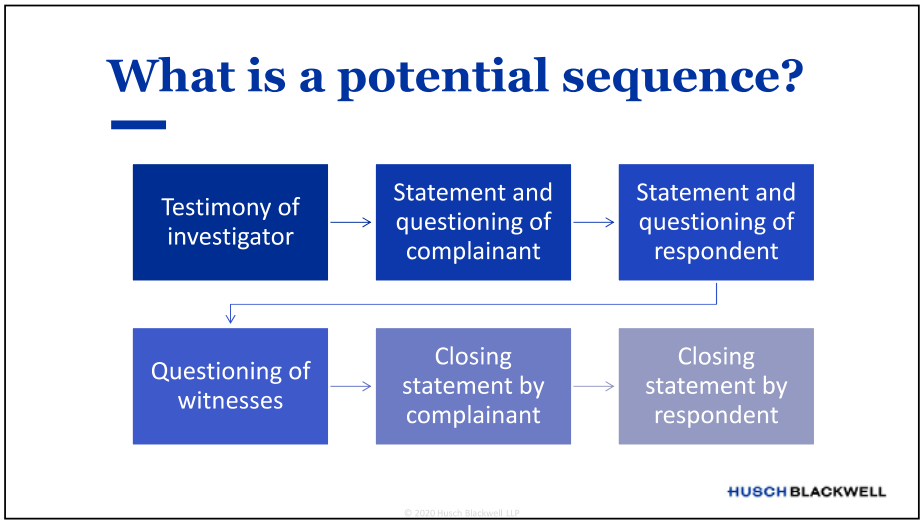


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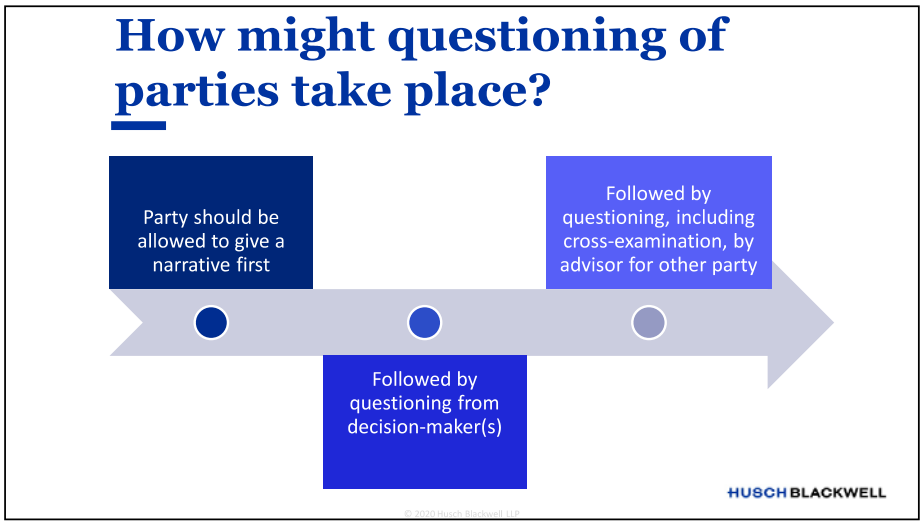


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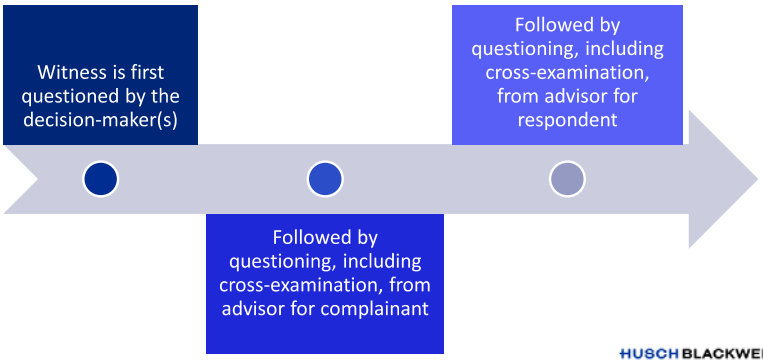
## How might questioning of witnesses take place?

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## Who determines relevance?

- Decision-maker(s) must screen questions for relevance and resolve relevance objections
- Decision-maker(s) must explain any decision to exclude a question as not-relevant

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# What is relevance?

Evidence is relevant if:

- It has a tendency to make a fact more or less probable than it would be without the evidence; and
- The fact is of consequence in determining the action

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# Example (relevant)

Student A has accused Student B of sexual assault by having sex with Student A while Student A was incapacitated by alcohol consumption after a party. Advisor for Student B asks Student A: "Did you send any text messages or make any phone calls during the party?"

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## Example (relevant)

Coach is accused of sexually propositioning Student B in exchange for more playing time. Advisor for complainant asks the Coach: "Didn't you tell one of the trainers that Student B is a 'very attractive young woman?'"

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## Example (not relevant)

Complainant alleges boyfriend/respondent engaged in dating violence by kicking complainant during an argument. Advisor for boyfriend/respondent asks complainant: "Isn't it true that you are only dating boyfriend/respondent because of his family's money?"

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## Example (not relevant)

Student A has accused Student B of sexual assault. Advisor for Student A asks Student B: "Were you convicted for driving under the influence when you were a sophomore in high school?"

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## Is sexual history considered?

- Generally, no – Evidence of a complainant's prior sexual behavior is relevant only if:
  - Offered to prove that someone other than the respondent committed the conduct, or
  - If evidence of specific incidents of the complainant's prior sexual behavior with the respondent are offered to prove consent

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## Example (impermissible)

Student A has accused a faculty member of sexual harassment. Advisor for the faculty member asks Student A: "How many men did you sleep with in the month before you claimed the faculty member sexually harassed you?"

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## Example (permissible)

Student A has accused Student B of sexual assault. Student A testified that Student B had intercourse with Student A without using a condom, which Student A states Student A would never have agreed to because Student A always requires protection. Advisor for Student B asks Student A: "But didn't you have unprotected sex with Student B a week prior? And didn't you tell Student B it was 'okay' that Student B didn't wear a condom?"

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## Does any testimony get excluded?

- Yes – Decision-maker(s) must exclude the statements of any party or witness who refuses to submit to cross-examination from the other party's advisor

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## Example (excluded)

Complainant gives emotional account of sexual assault and answers questions from hearing panel chair. Complainant then answers only one question from respondent's advisor before breaking down and refusing to answer any more. After a break is taken, complainant tells hearing panel chair complainant cannot endure cross-examination. Complainant leaves the hearing.

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## Example (excluded)

Witness gives statement to investigator that witness observed complainant right before alleged sexual assault. Witness told the investigator that complainant was too drunk to stand up. Witness fails to attend hearing. Investigator is prepared to relay what witness told investigator.

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## Example (not-excluded)

Witness answers questions from hearing officer. After consulting with complainant, advisor for complainant says that the advisor has no questions for witnesses. Advisor for respondent then proceeds to cross-examine witness.

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## Can we set standards of behavior for hearings?

Yes, provided they are applied equally and do not violate explicit guarantees from the Title IX regulation.

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## Example (permissible)

Institution's hearing procedures require all participants to maintain decorum, remain at their respective assigned table at all times, and direct all communications to the hearing officer with the exception of questions posed to the other party and witnesses by each party's respective advisor.

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## Example (impermissible)

Institution's policy prohibits a party or advisor from "doing anything that would make another party uncomfortable or suffer anxiety, including asking questions that may cause a party to relive an experience in a traumatizing way."

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## How long does a hearing last?

- Decision-maker(s) have the ability to set reasonable time limits on the hearing and its constituent parts
- Parties must have a reasonable opportunity to conduct questioning/ cross-examination, but do not have the right to question/cross-examine witnesses as long as they want
- Decision-maker(s) should set an overall length to the hearing in advance and keep parties on schedule

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# How do(es) the decision-maker(s) decide a case?

- After hearing, decision-maker(s) must deliberate and consider all the admissible testimony and admissible non-testimonial evidence
- Evaluate evidence for weight and credibility
- Resolve disputed issues of fact under the standard of evidence adopted by the institution
- Using the facts as found, apply the policy's definitions to those facts to determine whether sexual harassment occurred

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# What does it mean to weigh evidence?

- Not all evidence has equal value
- Some evidence may be more reliable and probative than other evidence
- Weight may vary depending on a range of factors, such as credibility; corroboration; consistency; level of detail; expertise of the witness; whether a witness is disinterested, etc.

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## Example of considerable weight

Witness testified he saw complainant and respondent leave the bar at 11:05 pm as witness was arriving. Witness states he clearly saw their faces and remarked to a friend about a particular t-shirt the complainant was wearing and how respondent had a nose ring. Witness testified he knows the time was exactly 11:05 pm because witness remembers receiving a phone call right as witness entered the bar, and witness's call log indicates the call was received at 11:05 pm.

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## Example of less weight

Witness says he saw a couple leaving the bar "sometime after ten but before midnight" but witness is not "sure exactly" when. Witness testified they "sort of looked" like complainant and respondent and witness is "pretty sure" it was them. But witness also says witness had spent two hours at a different bar before that and was "pretty drunk at the time I saw them."

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## How do(es) the decision-maker(s) issue a decision?

- In a written document, provided contemporaneously to the parties that:
  - Identifies the allegations of sexual harassment
  - Describes the various procedural steps taken from the time the formal complaint was made
  - States findings of facts supporting the determination
  - Reaches conclusions regarding application of relevant policy definitions to the facts
  - Includes a rationale for each finding for each allegation
  - States the disciplinary sanctions and remedies, if implicated by the determination made, and
  - Explains the procedures and grounds for appeal

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## Who determines discipline and remediation?

- This is a question of institutional choice
- Some institutions will have the decision-maker(s) also impose discipline
- Others may refer a disciplinary authority with jurisdiction over the respondent (i.e., Dean of Students, Provost, Director of Human Resources, etc.)
- If referred to someone else, that must occur before the written determination is issued

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## What principles do we use to determine discipline?

- Discipline should vary depending on the nature of the violation found considering aggravating and mitigating factors
- All things being equal, like violations should have like punishments
- Discipline has educational, punitive, and protective elements

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## What principles do we use to determine remediation?

- If a violation is found, institution must take steps to restore or preserve the complainant's access to education
- Various types of supportive measures may be utilized after the determination to restore or preserve access
- Institution is not required to provide the exact remedy requested, but must provide a remedy that is not clearly unreasonable

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## Group Scenario

Student A accuses Student B of sexual assault. During the investigation, Student C told the investigator Student C saw Student B carry Student A—passed out—into Student B's dorm room immediately before the alleged sexual assault. Student C does not appear for the hearing as expected. Student A testifies to the hearing officer that the investigator told Student A that Student C saw that Student A was passed out. When Student A testifies to this, Student B's advocate objects, demands a "mistrial", and refuses to be silent after the hearing officer declines to exclude the testimony.

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# Appeals

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## What is the purpose of the appeal?

- Appeal permits challenge of a dismissal or determination on certain limited grounds
- Appeals are not an opportunity to re-argue an outcome or seek "de novo" review

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## Who can appeal?

- Title IX regulation requires that either party be allowed to appeal
- Third-party persons cannot file appeals on behalf of a party

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## Can an institution set a time limit to appeal?

- Yes – an institution can and should require an appeal to be filed within a reasonable number of days after a dismissal or determination
- Institution may set a secondary deadline for the non-appealing party to elect to file a cross-appeal *after* the first party has appealed

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## What are the grounds for appeal?

Title IX regulation requires the following permitted grounds:

- Procedural irregularity that affected the outcome of the matter
- New evidence that was not reasonably available at the time of the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; or
- Title IX Coordinator, investigator, or decision-maker (hearing official) had a conflict of interest or bias against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter

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## Example (procedural irregularity)

During a hearing, the hearing officer denies the respondent's advisor the right to question witnesses. The respondent appeals, citing this procedural irregularity, and argues that key witness testimony relied on by the hearing officer must be excluded because the witness was not subjected to questioning by the advisor, as required by the policy. And without such testimony, the outcome cannot be supported.

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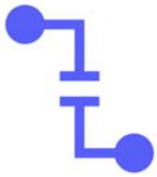
## Are all procedural errors appealable?

- No – the procedural irregularity must be one that "affected the outcome of the matter"
- Errors that affect the outcome may be referred to as "prejudicial" errors
- Errors that do not affect the outcome may be called "non-prejudicial" or "harmless" errors



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## Example (harmless error)

Policy required hearing to be held within 60 days of submission of Formal Complaint. Hearing was held 61 days after submission of Formal Complaint due to a counting error. The evidence would have been the same if the hearing were held a day earlier.

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## Example (new evidence)

After determination is made that respondent did not commit sexual harassment, complainant secures a previously unknown video made by a bystander at the party that depicts respondent groping complainant and complainant attempting to pull away from respondent. The student who took the video has been away studying abroad and only learned of the hearing after returning a few days ago.

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## Example (conflict of interest/bias)

After determination is made that respondent committed sexual harassment, respondent sees social media post by hearing officer stating: "All victims of sexual harassment must be believed. False reports of harassment are exceedingly rare. A person accused of sexual harassment is a guilty person in my book." Respondent argues bias resulted in a sham hearing with the outcome predetermined.

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## What is the appeal process?

| | |
|---|---|
| Deadline | A party must file appeal by the institutional deadline |
| Notice | Non-appealing party must be notified in writing of the appeal |
| Statements | Both parties must be given a reasonable, equal opportunity to submit a written statement in support of or in opposition to the appeal, as the case may be |
| Written Decision | Appeal officer must issue a written decision describing outcome and rationale |
| Provided to Parties | Written decision must be provided simultaneously to parties |

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## Should we ever dismiss an appeal?

- Yes – dismissal is appropriate if:
  - Appeal is filed after the reasonable deadline set in the policy
  - Appealing party does not articulate one of the three grounds for appeal

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## May the institution appeal if the parties don't?

- No – the institution does not take appeals of its own determinations
- In the event a formal complaint is filed by the Title IX Coordinator, the Title IX Coordinator should not have the right to appeal

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## Can we require an appealing party to explain their appeal?

Yes – an institution can require that the appealing party state the grounds for appeal and also explain, with some level of specificity, why the appeal should be granted.

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## How does the appeal officer make their decision?

- Appeal officer's review is limited in scope to the grounds stated for appeal
- Appeal officer does not hold a new hearing
- Appeal officer must review the appeal, response, and hearing record (to the extent necessary, depending on the grounds for appeal)
- Appeal officer must then draft a written decision that states the outcome of the appeal and rationale

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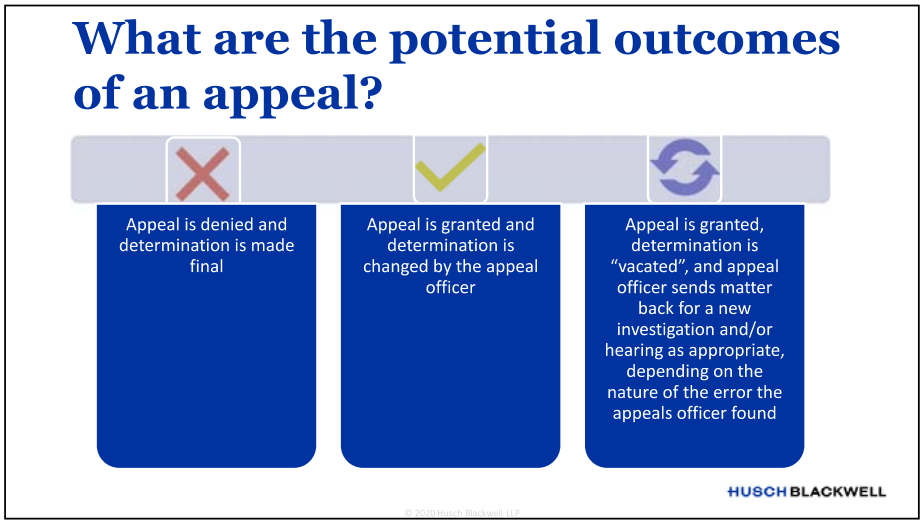


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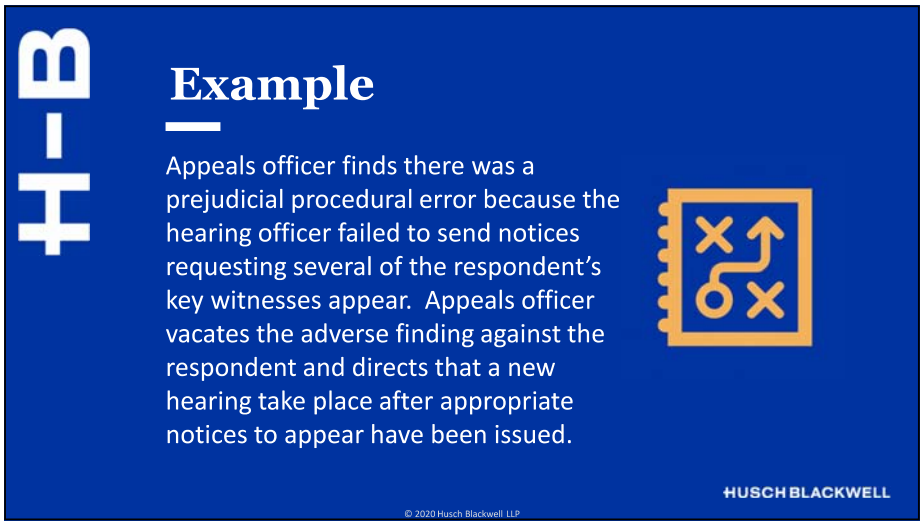


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## Is there further review after appeal?

Unless policy expressly provides for second level appeals (not recommended), President and Board should not entertain pleas for additional review.

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## Group Scenario

After a hearing, a faculty member—who is also a principal investigator in externally funded research—is determined to have sexually harassed a student lab assistant by repeatedly making sexualized comments about the student's physique and manner of dress when the student was performing research duties in the lab. Faculty member appeals on ground that the Title IX Coordinator was biased insofar as faculty member had previously challenged and argued with Title IX Coordinator during faculty trainings about whether the Title IX process was a "kangaroo court." Faculty member did not raise a concern about bias until the appeal. Hearing officer was a retired judge who heard testimony during the hearing from eight students and lab employees who all corroborated the complainant's account.

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# Informal Resolution

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## What is informal resolution?

A voluntary process to resolve formal complaints of sexual harassment through a mechanism other than the default investigation and hearing.

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## What are the key concepts of informal resolution?

- A formal complaint must first have been filed and written notice given to the parties
- The parties must be apprised in writing of how the informal resolution process will work and the consequences of participating in it
- The parties must voluntarily agree to participate in writing
- The parties must be allowed to withdraw from informal resolution up until the point it is final

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## Example

Parties agree to engage in informal resolution in the form of mediation. Parties meet with third-party mediator three times over the course of two weeks and are very near to reaching a complete agreement. The morning of the last session, the complainant indicates a desire to stop mediation and resume the formal investigation/hearing process.

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## What are the limitations?

- Informal resolution cannot be used where an employee is accused of sexually harassing a student
- Informal resolution cannot be used in the absence of a formal complaint
- Institution cannot require persons to consent to informal resolution as a condition of employment or enrollment

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## Example (impermissible)

Student files a formal complaint accusing a faculty member of offering to give student better grades in exchange for sexual favors. Faculty member proposes to informally resolve the complaint by apologizing for a "bad joke" and having a colleague grade student's work product. Student indicates they are amenable to the faculty member's proposal.

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## How would the prior example be resolved?

- Investigation and hearing process would resume
- If student withdraws complaint, or refuses to participate, institution might elect to dismiss complaint
- But Title IX Coordinator might also elect to file formal complaint and cause the issue to be adjudicated fully

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## Example (impermissible)

Enrollment agreement for students contains a clause stating: "Student hereby waives their right to a formal investigation and hearing as contemplated by Title IX and instead agrees that all reports of sexual harassment will be summarily resolved by a decision issued by the Dean of Students after an investigation."

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## Who facilitates an informal resolution?

- Any suitably qualified and trained person may facilitate informal resolution, including the Title IX Coordinator
- Facilitator can be a third-party mediator or alternative dispute resolution specialist
- Default rules on conflicts of interest and bias apply

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## What are some examples of informal resolution?

- Facilitated exchange of resolution offers
- Mediation
- Arbitration
- Restorative justice
- Settlement with the involvement of attorneys

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## Does every case with disputed facts have to proceed to hearing?

- No – As long as the procedural requirements to enter informal resolution are met, Title IX regulations permit a wide range of alternative models, including a decision by a single individual (i.e., "arbitration")
- It is especially important to advise the parties of the nature of this type of resolution and how it differs from the default investigation and hearing

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## How long can an informal resolution take?

- Informal resolution should be reasonably prompt
- Typically has the effect of suspending any default investigation and hearing process
- If informal resolution fails or appears futile, institution should promptly resume default investigation and hearing process

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## Is an informal resolution final?

- Generally, yes – Most informal resolutions will result in an agreement that resolves the allegations in a definitive and final way
- A party cannot demand an investigation and hearing of the same conduct that has been resolved through informal resolution
- Exception exists if terms of the informal resolution are not final (i.e., contingent) and contemplate a potential return to the formal process

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## Example

Informal resolution indicates that, in lieu of investigation and hearing, respondent will apologize for respondent's misconduct and attend counseling, but should respondent sexually harass complainant again, complainant will be free to file a formal complaint encompassing the entire range of sexual harassment.

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# How is an informal resolution documented?

- Agreements should be well-documented by the informal resolution facilitator
- Ideally, parties will sign the agreement or provide some other form of written confirmation
- Formal settlement agreements are typically not required unless they are resolving legal claims that have been asserted

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## Group Scenario

Student A makes a report that Student B slapped, punched, and shoved Student A while the two were dating. Student A and Student B verbally agree for the Title IX Coordinator to attempt to mediate a resolution. Title IX Coordinator meets separately with each party and mediates a resolution that involves Student B apologizing and attending anger management classes. Each student signs a term sheet. Student B attends two weeks of anger management classes and then stops going. Student A then files a formal complaint based on the allegations in the previous report.

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# Confidentiality

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## Are sexual harassment cases confidential?

- Sexual harassment cases should be treated as confidential by the institution, with information only shared as necessary to effectuate the policy
- Records containing identifying information on students are subject to FERPA analysis
- The Title IX regulation contains an express preemption, permitting FERPA-protected material to be used as required by Title IX itself

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## Are parties allowed to talk about a case?

- Title IX regulation prohibits an institution from restricting the ability of a party to discuss the allegations under investigation or to gather or present evidence
- First Amendment additionally limits public institutions' ability to restrict speech about a case
- Witness manipulation and intimidation can still be addressed by institution

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## Example (permitted communication)

Respondent in sexual harassment case affirmatively calls several other students who know complainant. Respondent tells such persons he has been accused of sexual harassment and is attempting to determine whether the complainant discussed the effect of respondent's actions with any of them.

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## Example (institution may restrict)

Complainant contacts witness who complainant knows will testify to witness' belief, based on observation, that complainant was not incapacitated and desired to have sex with respondent. Complainant tells witness to ignore investigator's request for an interview, to lie if witness is asked what witness observed, and not to show up at a hearing under any circumstances.

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## Are interviews and hearings confidential?

- Institution should restrict access to investigations and hearings to those persons whose attendance is required to effectuate policy
- Parties may be accompanied by advisors of choice and potentially others if justified by the need for a reasonable accommodation
- Media should not be granted access to interviews and hearings

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## Group Scenario

Student A is being investigated for sexually assaulting Student B. Student A contacts various individuals who were present at a party immediately before the sexual assault and asks the individuals to sign a declaration attesting that Student B was sober and fondling Student A in front of others. One such individual is a friend of Student B's and complains to the Title IX Coordinator. Later, when Student A is given access to the investigation evidence before the conclusion of the investigation, Student A posts the entire evidentiary record online.

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